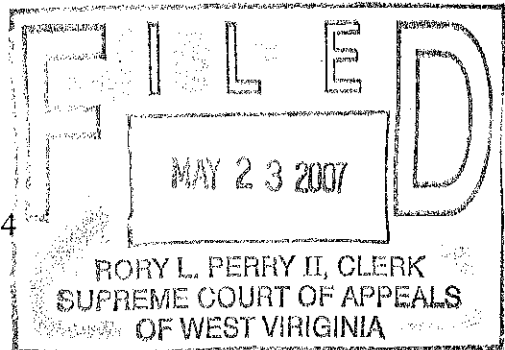


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
AT CHARLESTON  
APPEAL NO. 070470**

263 TOWING, INC.,  
PLAINTIFF/RESPONDENT

v.

Civil Action No. 05-C-304



LONNIE HANNAH, Sheriff of  
Mingo County; MINGO OFFICE OF  
EMERGENCY SERVICES; and THE  
COUNTY COMMISSION OF MINGO COUNTY,  
DEFENDANTS  
of whom LONNIE HANNAH, Sheriff of  
Mingo County is PETITIONER

MARCUM TRUCKING COMPANY, INC.  
PLAINTIFF/RESPONDENT

v.


Civil Action No. 06-C-305

LONNIE HANNAH, Sheriff of  
Mingo County; MINGO OFFICE OF  
EMERGENCY SERVICES; and THE  
COUNTY COMMISSION OF MINGO COUNTY,  
DEFENDANTS  
of whom  
LONNIE HANNAH, Sheriff of Mingo County is  
PETITIONER

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**BRIEF OF AMICUS CURIAE  
THE WEST VIRGINIA SHERIFFS' ASSOCIATION**

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## Background of the West Virginia Sheriffs' Association

The West Virginia Sheriffs' Association is an association comprised of the current sitting elected sheriffs of all 55 Counties within the State of West Virginia established for the welfare of persons engaged in the important service to the Office of the Sheriff; to establish among its members bonds of confidence, respect and friendship; to knit together, in composite whole all engaged in the high calling of maintaining the peace and security of society; to bring together for the mutual benefit of its members and for the benefit of the public at large the knowledge and experience gained; to observe, study and analyze statutes and legislation of our State to the end that laws, processes and procedures may be continually adapted to accomplish the greatest public good. The West Virginia Sheriffs' Association also has enrolled in its membership approximately 11,400 citizens who have joined the organization as honorary members. The objectives of the association are declared to be:

1. To encourage and promote fair and efficient administration of criminal justice throughout the State of West Virginia.
2. To encourage protection of the jurisdiction of the sheriff as a constitutional officer and to support sheriffs throughout the State of West Virginia in their efforts to discharge their responsibilities in a fair, efficient and professional manner.
3. To cooperate with public and private organizations dedicated to the reduction of crime, improvement of law enforcement and other criminal justice agencies.
4. To develop and encourage the practice of high standards of personal and professional conduct among sheriffs and other law enforcement officers.
5. To conduct research, study and investigation as may be necessary and advisable to develop information, knowledge and data which would be useful in improving the administration of criminal justice.
6. To promote the law enforcement profession by providing appropriate educational courses.

7. To encourage, plan and implement programs designed to foster respect for the law by juveniles and to combat delinquency and unlawful behavior by youths.
8. To acquire, preserve and disseminate valuable information related to the office of the sheriff and the administration of criminal justice.
9. To acquire, use and dispose of such property as may be necessary for the transaction of its business

#### Position of the West Virginia Sheriffs' Association

The West Virginia Sheriffs' Association respectfully suggests that the trial court erroneously concluded that the sheriff had no discretion to refuse payment and further improperly penalized the Sheriff by an award of attorneys fees and interest.

#### Factual Background

The West Virginia Sheriffs' Association was not a participant in the proceedings below, and has no independent knowledge of the facts relevant to the dispute pending before this Court. The West Virginia Sheriffs' Association relies upon the recitation of facts and procedural history set forth in the Appellant's brief.

The West Virginia Sheriffs' Association also relies upon certain findings of fact and conclusions of law set forth in the trial court's orders. More specifically, the trial court noted that the Sheriff refused to pay the contested pay orders "on the basis that Sheriff Hannah believes that crimes may have been committed and alleges that the federal authorities had advised him not to sign the checks without an Order from this Court due to an alleged ongoing investigation of Marcum Trucking." Amended Final Order Granting Writ of Mandamus – Marcum Trucking case, pp. 3-4.<sup>1</sup> See also Final Order Granting Writ of Mandamus – 263

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<sup>1</sup> The West Virginia Sheriffs' Association also has concerns about the trial court cross examining the Sheriff regarding an ongoing criminal investigation, apparently in open court.

Towing case, p.4. The trial court held, as a matter of law, that neither the Sheriff nor the court have the authority to substitute their judgment for that of the County Commission.

## DISCUSSION

- I. **West Virginia Code § 7-5-7 does not impose a duty on a West Virginia Sheriff to honor every pay order issued by a County Commission, instead it requires prompt payment of legal, legitimate, and uncontested invoices.**

West Virginia Code §7-5-7 provides for the prompt payment of "legitimate uncontested invoices." The Prompt Pay Act of 1995 however does not define "legitimate uncontested invoice." The Act, in relevant part, provides:

(a) Any properly registered and qualified vendor who supplies services or commodities to any county, or agency thereof, shall be entitled to prompt payment upon presentation to that county or agency of a **legitimate uncontested invoice**. \* \* \*

(d) The county or agency initially receiving a **legitimate uncontested invoice** shall process the invoice for payment within ten days from its receipt. Failure to comply with the requirements of this subsection shall render the county or agency liable for payment of the interest mandated by this section when there is a failure to promptly pay a **legitimate uncontested invoice**: Provided, That a county agency shall not be liable for payment of interest owed by another county agency under this section.

(e) Any other county agency charged by law with processing a county agency's requisition for payment of a **legitimate uncontested invoice** shall either process the claim or reject it for good cause within ten days after the agency receives it. Failure to comply with the requirements of this subsection shall render the county agency liable for payment of the interest mandated by this section when there is a failure to promptly pay a **legitimate uncontested invoice**: Provided, That a county agency shall not be liable for payment of interest owed by another county agency under this section. \* \* \* (emphasis added).

Absent a statutory definition, a Sheriff might be expected to give the words their ordinary meaning and use ordinary common sense in deciding whether any particular invoice is "legitimate" or "uncontested."

A Sheriff has, by necessity and implication, the inherent authority to refuse to honor a County Commission pay order that is not legitimate and uncontested. In *State ex rel. Damron v. Ferrell*, 149 W. Va. 773, 143 S.E.2d 469 (1965), this Court noted:

Within the limits of that constitutional provision the legislature has seen fit to give county courts [now County Commissions] extensive authority and duties. *See*, Code, 7-1-1, 3 and 5, as amended. Likewise a sheriff is a constitutional officer and by statute, Code, 7-5-1, that official is also *ex officio* the county treasurer. Code, 7-5-4, provides that "No money shall be paid by the sheriff out of the county treasury except upon an order signed by the president and clerk of the county court, and properly endorsed: . . ." \* \* \* \* The sheriff of a county, in making payment of such expenditures upon a proper order of payment by the county court, is acting in an administrative capacity and has no discretion with regard to making such payment **if the order of payment be legal.**

*Id.* at 776, 143 S.E.2d at 472 (emphasis added). As *ex officio* Treasurer, the Sheriff has a duty to pay only orders of payment that are legal.

While the vast majority of pay orders received by any Sheriff will be valid on their face, and will carry the presumption of correctness, what is a Sheriff to do when faced with credible information that the pay order is not valid or legal?

In this case, it appears that Sheriff Hannah had personal information that caused him to believe that the invoices submitted by Marcum Towing Company, Inc. and 263 Towing,

Inc. were not legitimate. A Mingo County Grand Jury had returned indictments<sup>2</sup> against Marcum Towing and 263 Towing and state and federal criminal investigations regarding the invoices submitted to the County for payment were underway. Was this Sheriff, or any Sheriff, the Chief law enforcement officer of the County, required to abandon his law enforcement position and ignore personal knowledge with criminal implications in order to pay County moneys simply because the suspect invoices were approved by the County Commission?

Or is the Sheriff permitted to draw the reasonable and logical inference that the indictments and the state and federal criminal investigations mean that the invoices at issue are not legitimate and uncontested until such time as the criminal investigation is resolved? Is a Sheriff bound by the legal determination of a County Commission, or can the Sheriff, in the best interests of the County, exercise sound discretion to refuse to pay an invoice which may have been obtained by fraud or other misconduct?

The Sheriff and the sureties on his official bond are liable for all public monies coming into the Sheriff's hands as *ex officio* Treasurer from every source. West Virginia Code §7-5-1. If the Sheriff disburses county funds that he or she has reason to suspect should not be lawfully paid, would he or she be guilty of failing to perform official duties? See West Virginia Code §61-5-28. At the very least, the Sheriff may be liable personally and/or on his official bond if he knowingly, recklessly or negligently pays an order which is later determined to be invalid.

The trial court below seemed to take the position that the Sheriff did not have the right to contest an invoice, at least not after the County Commission approved the invoices for

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<sup>2</sup> Those indictments were *nolle prossed* on March 1, 2006. Interest was calculated from October 25, 2005.



payment. When a Sheriff has concerns regarding the validity of an invoice for services, and expresses those concerns, who determines whether the invoice is legitimate or contested? The trial court was of the opinion that the County Commission, and only the County Commission, had authority to decide the legality of an invoice. The Sheriffs' Association respectfully disagrees and suggests that the courts should be the arbiters of the legitimacy of an invoice when there is a genuine issue of validity. Quite naturally, the Court will give substantial weight to the County Commission's findings of fact, however the County Commission's findings cannot, and should not, be conclusive upon the Court.

**II. An award of attorneys fees and interest charged against a Sheriff who acts reasonably, in good faith, and in the best interest of the County he or she serves unreasonably chills the Sheriff's responsible use of discretion in murky areas of law.**

A Sheriff's good faith determination that a County Commission order to pay an invoice from County Funds entrusted to the Sheriff is not "legitimate" should not expose him to an award of attorneys fees and interest.

There is no provision in the Prompt Pay Act for an award of attorney fees. "There is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees and 'costs,' without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." Syllabus Point 3, *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986).

In the Marcum Trucking case, the trial court relied upon *Bennett v. Adkins*, 194 W. Va. 372, 380, 460 S.E.2d 507, 515 (1995), for the proposition that a prevailing party in a mandamus action is entitled to an award of attorneys fees when a Sheriff fails to perform a

required duty, however *Bennett* does not impose a presumption of attorneys fees for simply failing in a legal duty. Syllabus point 6 of *Bennett* provides:

"Where a public official has failed to exercise a clear legal duty, although the failure was not the result of a decision to knowingly disregard a legal command, there is no presumption in favor of an award of attorney's fees. Rather, the Court will weigh the following factors to determine whether it would be fairer to leave the costs of litigation with the private litigant or impose them on the taxpayers: (a) the relative clarity by which the legal duty was established; (b) whether the ruling promoted the general public interest or merely protected the private interest of the petitioner or a small group of individuals; and (c) whether the petitioner has adequate financial resources such that petitioner can afford to protect his or her own interests in court and as between the government and petitioner." Syllabus point 4, *State ex rel. West Virginia Highlands Conservancy, Inc., et al. v. West Virginia Division of Environmental Protection and Callaghan, et al.*, 193 W.Va. 650, 458 S.E.2d 88 (1995).

There is no indication in the trial court's order that the factors discussed in *Bennett* were considered. In the 263 Towing case, the trial court appropriately discussed and applied a willful disobedience standard.

Absent extraordinary measures undertaken to defeat a clearly defined legal right, neither this Sheriff, nor any Sheriff, should be exposed to an award of attorneys fees. The Sheriff's good faith belief in the wrongfulness of the pay orders, the indictments handed down by a Mingo County Grand Jury and the ongoing criminal investigations, should be sufficient, as a matter of law, to preclude an award of attorneys fees for willful misconduct.

The chilling effect of an inappropriate award of attorneys fees could make Sheriffs hesitate to take appropriate and reasonable actions in their official duties in order to protect their budget. Public servants exercising their official discretion in the discharge of their duties cannot live in constant fear of lawsuits, with the concomitant costs to the public servant

and society. See *Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374 (1995); *Goines v. James*, 189 W.Va. 634, 433 S.E.2d 572 (1993); *Bennett v. Coffman*, 178 W.Va. 500, 361 S.E.2d 456 (1987). Such fear will stymie the work of state government, and will "dampen the ardor of all but the most resolute, or the most irresponsible, [public officials] in the unflinching discharge of their duties." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); see also *Parkulo v. West Virginia Board of Probation and Parole*, 196 W.Va. 161, 177-78, 483 S.E.2d 507 (1996) ("The public interest is that the official conduct of the officer is not to be impaired by constant concern about personal liability").

Likewise, an award of interest assessed against a Sheriff who reasonably, but mistakenly, determines that a County Commission pay order is invalid, has the potential, albeit with less force and effect, to interfere with a Sheriff's exercise of discretion in the performance of official duties.

**III. The West Virginia Sheriffs' Association suggests that this Court clearly define the term "legitimate uncontested invoice" so that Sheriffs and County Commissions can avoid unnecessary litigation and provide better service to their constituents.**

The West Virginia Sheriffs' Association respectfully suggests, based upon the cases and the statutes discussed above, that it is not clear whether a duly elective Sheriff and *ex officio* Treasurer of a county has any discretion to refuse what he or she believes is an illegal order to pay county funds. If the duties of the Office of Treasurer relating to pay orders are purely ministerial, this Court should establish that bright line rule. If however, the Treasurer has some responsibility to prevent wrongful spending, the limits of that discretion should also be made clear. Regardless of the ultimate outcome of the dispute pending before this Court, all

Sheriffs should have a clearly defined standard to apply to case in case decision making when faced with situations where official pay orders may have been obtained wrongfully.

**IV. The trial court was incorrect when it concluded that it may not substitute its judgment for that of the County Commission regarding its pay orders.**

If the trial court does not have or exercise jurisdiction over the spending decisions of the County Commission when there are good faith disputes over the propriety of those disputes, how are such disputes to be resolved? Courts, not County Commissions, are the traditional manner of resolving legal disputes.

In *State ex rel. Damron v. Ferrell*, 149 W. Va. 773, 143 S.E.2d 469 (1965), this Court refused to issue a writ of mandamus against the Sheriff of Logan County on the grounds that the pay order subject to the writ was not lawful. *Id.* at 778. Clearly the trial court has authority to review the lawfulness of the County Commission's pay order, it does not simply enforce County Commission orders.

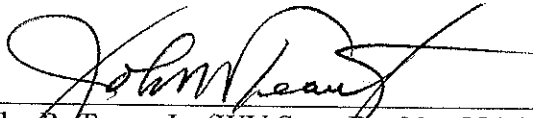
Make no mistake, however. The West Virginia Sheriffs' Association does not advocate judicial review of every County Commission pay order and has no desire to make the trial courts of this State another step in the payment process. Rather, the West Virginia Sheriffs' Association seeks uniform and clearly defined guidelines for its members throughout the State. It also advocates, and suggests to this Court that it is appropriate, to create a safe haven for Sheriffs from punitive awards of attorneys fees and interest when acting in good faith an upon reliable information that the pay orders presented to them are not "legitimate and uncontested." The West Virginia Sheriffs' Association does not suggest that any safe haven is appropriate or required when the Court finds, subject to judicial review, an arbitrary and capricious failure to perform legal duties.

## CONCLUSION

For the reasons set forth herein, the West Virginia Sheriffs' Association respectfully urges this Court to reverse the trial courts orders insofar as they impose sanctions upon the Sheriff of Mingo County. The West Virginia Sheriffs' Association also respectfully urges this Court to establish a clearly defined rule for resolving these issues in the future.

Respectfully submitted

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ASSOCIATION  
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